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Gold, The Fund Agreement in the Courts- Volume III

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BOOK REVIEW

THE FUND AGREEMENT IN THE COURTS—VOLUME III.
By Sir Joseph Gold. Washington, D.C.: International Monetary Fund edition, 1986. 841 pp., includes bibliographies and indexes. US\$45.00.

*Reviewed by Géric Lebedoff**

The Fund Agreement in the Courts—Volume III is an outstanding work that deals with the body of cases in which the provisions of the Articles of Agreement of the International Monetary Fund ("IMF") have affected the issues brought before the courts of Austria, England, the Federal Republic of Germany, France, Italy, Japan, Luxembourg, Mexico, The Netherlands, South Africa, Spain, and the United States, as well as before the Court of Justice of the European Communities and an international arbitration tribunal. The book compares the judicial decisions made in one country with those of other countries.

This third volume, like the two previously published in 1962 and 1982, will be of great assistance to both practicing lawyers and scholars because Sir Joseph Gold reviews the considerable body of jurisprudence that has grown up in recent years concerning the IMF Articles of Agreement. The book has twenty-four chapters that have been organized into three sections, dealing respectively with cases, topics, and views.

In the first section, the author reviews cases in which a major issue is whether Special Drawing Rights¹ ("SDRs") provide a solution for the problem of applying a gold unit of account in current conditions—for example, under legal provisions that limit a defendant's liability by reference to a unit of account defined in terms of gold. The section also discusses the possibility of expressing judgments in SDRs in certain circum-

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1. Special Drawing Rights were created "... in reaction to the need for a reserve asset created by the removal of gold as a backing for currencies. Generally speaking, the SDR is composed of a 'basket' (or average value) of selected principal convertible currencies. ... Currently, the SDR is comprised of a certain percentage of value of the U.S. Dollar, the Deutsche mark, the French franc, the Japanese yen, and the Pound Sterling." N. DEAK & J. CELUSAK, *INTERNATIONAL BANKING* 156 (1985).

stances and in certain jurisdictions. It also approaches various problems raised in connection with the IMF Articles of Agreement from the standpoint of some new legal decisions and their connection to earlier decisions.

Section Two is devoted to specific topics, including, among others, legal concepts of public policy, capital transfers, the continued effect of the former par values of currencies, the hierarchy of defenses when the exchange control of another country is involved in litigation, the differences between exchange restrictions and governmental failures to perform contractual obligations, and obligations to apply for exchange licenses. Special emphasis is put on the interpretation and application of article VIII, section 2(b) of the International Monetary Fund's Articles of Agreement,² which reads as follows:

Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, cooperate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and such regulations are consistent with this agreement.³

This provision, more than any other, has triggered judicial consideration and scholarly debate. The provision contains one of the main collaborative concepts set up at Bretton Woods.⁴ Most of the court cases reviewed by the author in that section involve the various interpretations of article VIII, section 2(b). As Sir Joseph puts it, "if a member's exchange control regulations are maintained or imposed consistently with the Fund's Article, the courts of other members must treat certain contracts as unenforceable if they are contrary to the regulations." (P. 10.) It is striking to note that a rather brief provision has resulted in such an extraordinary range of issues, judicial interpretation, and scholarly glosses. The legal debate

2. 60 Stat. 1401, 1411, T.I.A.S. No. 1501, at 12, 2 U.N.T.S. 39, 66-68.

3. *Id.*

4. "Bretton Woods" is the unofficial name for the Articles of Agreement of the International Money Fund, adopted at Bretton Woods, New Hampshire, on July 22, 1944, entered into force December 27, 1945, 60 Stat. 1401, T.I.A.S. No. 1501, 2 U.N.T.S. 39.

provoked by article VIII, section 2(b) constitutes a contribution to the recognition of the modern and increasing economic interdependence among nations.

The author also pays attention to other issues relating to exchange control, including the relationship between the IMF Articles of Agreement and private international law, the burden of proof and the role of presumptions, consequences of the failure to give domestic effect to article VIII, section 2(b), the impact of this provision on the assignment and guarantee of claims arising under exchange contracts, the effect of information on exchange-control regulations provided by the IMF, and the effect of newly introduced exchange-control regulations on existing contracts.

Section Three provides a detailed examination of, and commentary upon, the American Law Institute's draft of three chapters on monetary law provisions, to be included for the first time in the Institute's revision of the Restatement of the Foreign Relations Law of the United States.⁵ The three chapters relate to exchange arrangements of members of the IMF, article VIII, section 2(b), and the expression of judgments in currency foreign to the forum. Readers may at first wonder why the drafts are discussed when it seems reasonable to assume that the final text of the Restatement will be modified. It appears, however, that the drafts are discussed from the standpoint of the issues that they raise. The discussion is thus of interest for the intellectual aspects of the questions posed. Another chapter in Section Three is devoted to the opinions of legal scholars throughout the world on various aspects of article VIII, section 2(b) of the Fund's Articles of Agreement.

By the time the first volume of Sir Joseph Gold's *The Fund Agreement in the Courts* appeared in 1962, two substantial bibliographies had already been compiled by Sir Joseph. However, a large and still growing number of opinions have been published since that date. Chapter 23 of the current book gives an excellent idea of the diversity of interpretations on most of the leading problems. Attached to the chapter is a list of the principal works of various authors on article VIII, section 2(b), which will serve as a ready reference of great interest to many

5. RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES ch. 2 (Tent. Draft No. 7, 1986).

readers. A summary of the author's views on article VIII, section 2(b) completes the book and shows how earlier opinions have been renewed in the light of later legal cases and "parthenogenetic" further thought, as Sir Joseph likes to put it. (Preface, p. xv.)

Reading through the various chapters of the book reveals a clear message of the three interrelated principles of the author's work. First, the influence of an international organization depends not on fiat, but on the confidence that its practice inspires. Second, confidence in an international organization grows when an organization, in exercising its power, observes the rule of prior law. Third, for confidence in an international economic organization to develop, its interpretation must be consistent with both generally accepted legal principles and progressive, objective, and creative economic concepts. The new approach to the exchange-control regulations with which most of the book is concerned, and which stems from the interpretation made by the courts and the opinions of scholars, does not mean that the will of the foreign legislator must prevail whatever the circumstances may be. The IMF exists to act as an international arbitrator; as Sir Joseph notes, "If courts do not take into account the practice of the Fund on exchange control, an illogical conflict will exist between the will of the Governments on economic policy, as expressed through the fund, and the decisions of the Courts." (P. 12.)

To conclude, there is much to be found in *The Fund Agreement in the Courts—Volume III* that is of interest to international lawyers. The book is a major contribution, made by an expert of great stature in the field.

